



**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R04-OAR-2012-0081; FRL-9728-2]**

**Approval and Promulgation of Implementation Plans; Mississippi:**

**New Source Review-Prevention of Significant Deterioration;**

**Fine Particulate Matter (PM<sub>2.5</sub>)**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve changes to the Mississippi State Implementation Plan (SIP), submitted by the Mississippi Department of Environmental Quality (MDEQ) Division of Air Pollution Control to EPA on May 12, 2011. The May 12, 2011, SIP revision modifies Mississippi's New Source Review (NSR) Prevention of Significant Deterioration (PSD) permitting regulations to incorporate by reference, into the Mississippi SIP, federal NSR PSD requirements for the fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standards (NAAQS) as promulgated in EPA's 2008 NSR PM<sub>2.5</sub> Implementation Rule and the 2010 PM<sub>2.5</sub> PSD Increment, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC) Rule. EPA is approving portions of Mississippi's May 12, 2011, SIP revision because they are consistent with the Clean Air Act (CAA or Act) and EPA regulations regarding NSR permitting.

**EFFECTIVE DATE:** This rule will be effective [insert 30 days after date of publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket Identification No. EPA-R04-OAR-2012-0081. All documents in the docket are listed on the [www.regulations.gov](http://www.regulations.gov) web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For information regarding the Mississippi SIP, contact Ms. Twunjala Bradley, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Ms. Bradley's telephone number is (404) 562-9352; e-mail address: [bradley.twunjala@epa.gov](mailto:bradley.twunjala@epa.gov). For information regarding NSR, contact

Ms. Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562-9214; e-mail address: [adams.yolanda@epa.gov](mailto:adams.yolanda@epa.gov). For information regarding the PM<sub>2.5</sub> NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the same address above. Mr. Huey's telephone number is (404) 562-9104; e-mail address: [huey.joel@epa.gov](mailto:huey.joel@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

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### **I. Background**

EPA is taking final action on portions of Mississippi's May 12, 2011, SIP revision to incorporate by reference (IBR)<sup>1</sup> federal requirements for NSR permitting. Mississippi's May 12, 2011, SIP revision includes changes to its air quality regulations in Air Pollution Control, Section 5 (APC-S-5) - *Regulations for the Prevention of Significant Deterioration of Air Quality*. The May 12, 2011, changes IBR federal PSD permitting regulations promulgated in the final rulemakings entitled "Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)," 73 FR 28321 (May 16, 2008), hereafter referred to as the "NSR PM<sub>2.5</sub> Rule," and "Prevention of Significant Deterioration (PSD) for Particulate

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<sup>1</sup> Throughout this document IBR means incorporate or incorporates by reference.

Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>) – Increments, Significant Impact Levels SILs and Significant Monitoring Concentration (SMC),” 75 FR 64864 (October 20, 2010) hereafter referred to as the “PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule”). Additionally, Mississippi’s SIP revision requests that EPA remove from the SIP the exclusion language at APC-S-5 (2.7) regarding the NSR PM<sub>2.5</sub> Rule provisions. EPA is not approving in this action: (1) incorporation of the SIL thresholds and provisions promulgated in EPA’s PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule, 75 FR 64864 (October 20, 2010); and (2) incorporation of the provision regarding the applicability of the term “particulate matter emissions” when accounting for condensable particles in applicability determinations and in establishing emissions limitations in PSD permits.<sup>2</sup>

On July 23, 2012, EPA published a proposed rulemaking to approve the aforementioned changes to Mississippi’s NSR PSD program at APC-S-5. *See* 77 FR 43032. Comments on the proposed rulemaking were due on or before August 22, 2012. No comments, adverse or otherwise, were received on EPA’s July 23, 2012, proposed rulemaking. Pursuant to section 110 of the CAA, EPA is now taking final action to approve the changes to Mississippi’s NSR PSD program as provided in EPA’s July 23, 2012, proposed rulemaking. A summary of the background for today’s final action is provided below. EPA’s July 23, 2012, proposed rulemaking contains more detailed information regarding the Mississippi SIP revision being approved today, and the rationale for today’s final action. Detailed information regarding the

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<sup>2</sup> Today’s final action approves the incorporation by reference of 40 CFR 52.21 into the Mississippi SIP as of March 22, 2011 apart from the exclusions stated in this final rulemaking and at 40 CFR 52.1270(c). Any previous EPA exclusions to APS-S-5 at 40 CFR section 52.1270(c) remain in effect.

PM<sub>2.5</sub> NAAQS and NSR Program can also be found in EPA's July 23, 2012, proposed rulemaking as well as the abovementioned final rulemakings.

#### **A. NSR PM<sub>2.5</sub> Rule**

EPA finalized the NSR PM<sub>2.5</sub> Rule on May 16, 2008, which revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the PM<sub>2.5</sub> NAAQS in both attainment areas and nonattainment areas (NAAs) that: (1) require NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) establish significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (including sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides (NO<sub>x</sub>)); (3) establish PM<sub>2.5</sub> emission offsets; (4) provide exceptions to the grandfathering policy for permits being reviewed under the PM<sub>10</sub> surrogate program; and (5) require states to account for gases that condense to form particles (condensables) in PM<sub>2.5</sub> and PM<sub>10</sub> emission limits in PSD or nonattainment NSR (NNSR) permits. Additionally, the NSR PM<sub>2.5</sub> Rule authorized states to adopt provisions in their NNSR rules that would allow interpollutant offset trading. *See* 73 FR 28321. States were required to provide SIP submissions to address the requirements for the NSR PM<sub>2.5</sub> Rule by May 16, 2011. Mississippi's May 12, 2011, SIP revision addresses only the PSD requirements related to EPA's May 16, 2008, NSR PM<sub>2.5</sub> Rule.<sup>3</sup>

#### **1. PM<sub>10</sub> Surrogate and Grandfathering Policy**

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<sup>3</sup> Mississippi's May 12, 2011, SIP revision only addresses the State's PSD permitting program and does not adopt the NNSR permitting requirements for PM<sub>2.5</sub> emission offsets, condensable provision or the discretionary interpollutant trading policy and ratios promulgated in the 2008 NSR PM<sub>2.5</sub> Rule. Moreover, Mississippi is attainment for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS.

In the NSR PM<sub>2.5</sub> Rule, EPA required that major stationary sources seeking permits must begin directly satisfying the PM<sub>2.5</sub> requirements, as of the effective date of the rule, rather than relying on PM<sub>10</sub> as a surrogate, with two exceptions.<sup>4</sup> The first exception is a “grandfathering” provision in the federal PSD program at 40 CFR 52.21(i)(1)(xi). This grandfathering provision applied to sources that had applied for, but had not yet received, a final and effective PSD permit before the July 15, 2008, effective date of the May 2008 final rule. The second exception was that states with SIP-approved PSD programs could continue to implement the Seitz Memo’s PM<sub>10</sub> Surrogate Policy for up to three years (until May 2011) or until the individual revised state PSD programs for PM<sub>2.5</sub> are approved by EPA, whichever comes first. On May 18, 2011 (76 FR 28646), EPA took final action to repeal the grandfathering provision at 40 CFR 52.21(i)(1)(xi). This final action ended the use of the 1997 PM<sub>10</sub> Surrogate Policy for PSD permits under the federal PSD program at 40 CFR 52.21. In effect, any PSD permit applicant previously covered by the grandfathering provision (for sources that completed and submitted a permit application before July 15, 2008)<sup>5</sup> that did not have a final and effective PSD permit before the effective date of the repeal will not be able to rely on the 1997 PM<sub>10</sub> Surrogate Policy to satisfy the PSD

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<sup>4</sup> After EPA promulgated the NAAQS for PM<sub>2.5</sub> in 1997, the Agency issued guidance documents related to using PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> entitled: “Interim Implementation of New Source Review Requirements for PM<sub>2.5</sub>.” John S. Seitz, EPA, October 23, 1997 (the “Seitz Memo”) and “Implementation of New Source Review Requirements in PM-2.5 Nonattainment Areas” (the “2005 PM<sub>2.5</sub> NNSR Guidance”). The Seitz Memo was designed to help states implement NSR requirements pertaining to the new PM<sub>2.5</sub> NAAQS in light of technical difficulties posed by PM<sub>2.5</sub> at that time. The 2005 PM<sub>2.5</sub> NNSR Guidance provided direction regarding implementation of the NNSR provisions in PM<sub>2.5</sub> NAA in the interim period between the effective date of the PM<sub>2.5</sub> NAA designations (April 5, 2005) and EPA’s promulgation of final PM<sub>2.5</sub> NNSR regulations (this included recommending that until EPA promulgated the PM<sub>2.5</sub> major NSR regulations, “States should use a PM<sub>10</sub> nonattainment major NSR program as a surrogate to address the requirements of nonattainment major NSR for the PM<sub>2.5</sub> NAAQS.”).

<sup>5</sup> Sources that applied for a PSD permit under the federal PSD program on or after July 15, 2008, are already excluded from using the 1997 PM<sub>10</sub> Surrogate Policy as a means of satisfying the PSD requirements for PM<sub>2.5</sub>. See 76 FR 28321.

requirements for PM<sub>2.5</sub> unless the application includes a valid surrogacy demonstration.<sup>6</sup> See 76 FR 28646. In its May 12, 2011, SIP revision, Mississippi did not adopt the grandfathering provision at 40 CFR 52.21(i)(1)(xi) into its PSD regulations. Therefore, Mississippi's SIP is consistent with current federal regulations regarding the repeal of the grandfathering provision.

## 2. “Condensable” Provision

In the NSR PM<sub>2.5</sub> Rule, EPA revised the definition of “*regulated NSR pollutant*” for PSD to add a paragraph providing that “particulate matter (PM) emissions, PM<sub>2.5</sub> emissions and PM<sub>10</sub> emissions” shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, PM<sub>2.5</sub> and PM<sub>10</sub> in permits issued. See 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and “Emissions Offset Interpretative Ruling” (40 CFR Part 51, Appendix S). On March 16, 2012, EPA proposed a rulemaking to amend the definition of “*regulated NSR pollutant*” promulgated in the NSR PM<sub>2.5</sub> Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i) and EPA's Emissions Offset Interpretative Ruling. See 77 FR 15656. The rulemaking proposes to remove the inadvertent requirement in the NSR PM<sub>2.5</sub> Rule that the measurement of condensable “particulate matter emissions” be included as part of the measurement and regulation of “particulate matter emissions.”<sup>7</sup> Mississippi's May 12, 2011,

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<sup>6</sup> Additional information on this issue can also be found in an August 12, 2009, final order on a title V petition describing the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>. In the Matter of *Louisville Gas & Electric Company*, Petition No. IV-2008-3, Order on Petition (August 12, 2009).

<sup>7</sup> The term “particulate matter emissions” includes particles that are larger than PM<sub>2.5</sub> and PM<sub>10</sub> and is an indicator measured under various New Source Performance Standards (NSPS) at 40 CFR part 60. In addition to the NSPS for

SIP revision adopts EPA's definition for "*regulated NSR pollutant*" for condensables (at 40 CFR 51.166(b)(49)(vi)), including the term "particulate matter emissions," as promulgated in the NSR PM<sub>2.5</sub> Rule. On June 26, 2012, the State of Mississippi provided a letter to EPA clarifying the State's intent in light of EPA's March 12, 2012, proposed rulemaking and requesting that EPA not approve into the Mississippi SIP the term "particulate matter emissions" (as part of the definition for "*regulated NSR pollutant*") regarding the inclusion of condensable emissions in applicability determinations and in establishing emissions limitations for PM.

### **3. NO<sub>x</sub> insignificance Demonstration**

In addition to direct PM<sub>2.5</sub> emissions, pollutants that can contribute to ambient PM<sub>2.5</sub> concentrations (known as "precursors") include SO<sub>2</sub>, NO<sub>x</sub>, volatile organic compounds (VOC) and ammonia (all of which undergo chemical reactions to form secondary PM). In the NSR PM<sub>2.5</sub> Rule, EPA established a "presumed-in" approach for NO<sub>x</sub> as a PM<sub>2.5</sub> precursor. This approach is warranted based on the well-known transformation of NO<sub>x</sub> into nitrates, coupled with the fact that nitrate concentrations vary significantly around the country. The final NSR PM<sub>2.5</sub> Rule requires that states treat NO<sub>x</sub> as a PM<sub>2.5</sub> precursor in all areas unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of NO<sub>x</sub> from sources in a specific area are not a significant contributor to that area's ambient PM<sub>2.5</sub> concentrations.<sup>8</sup> See 40 CFR 51.166(b)(49)(i), 51.165(a)(1)(xxxvii) and 52.21(b)(50)(i). If EPA

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PM, it is noted that states have regulated "particulate matter emissions" for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

<sup>8</sup> The NSR PM<sub>2.5</sub> Rule presumes that VOC and ammonia are not precursors to PM<sub>2.5</sub> unless a state or EPA demonstrates that these pollutants are significantly contributing to the ambient PM<sub>2.5</sub> concentrations in a specific area. The rule requires that SO<sub>2</sub> be treated as a precursor to PM<sub>2.5</sub> in all areas.



makes such a demonstration, or a state makes such a demonstration and it is approved by EPA, NOx would not be considered a PM<sub>2.5</sub> precursor under the NSR program in that area. If a State or EPA does not make such a demonstration, NOx must be regulated as a precursor under the PSD, NNSR, and minor source programs for PM<sub>2.5</sub>. Mississippi's May 12, 2011, SIP revision IBR the provision that NOx is presumed to be a precursor for PM<sub>2.5</sub>. However, MDEQ also submitted to EPA a NOx insignificance demonstration to show that NOx emissions in the State of Mississippi are not contributing significantly to ambient PM<sub>2.5</sub> concentrations in the State. At this time, EPA is still considering Mississippi's NOx insignificance demonstration and will take action on this portion of MDEQ's May 12, 2011, SIP revision in a separate rulemaking.

## **B. PM<sub>2.5</sub> PSD Increment SILs-SMC Rule**

The PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule provided additional regulatory requirements under the PSD program regarding the implementation of the PM<sub>2.5</sub> NAAQS for NSR, including (1) PM<sub>2.5</sub> increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS; (2) SILs used as a screening tool (by a major source subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of PM<sub>2.5</sub>. The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis*,<sup>9</sup> modeled source impacts or monitored (ambient)

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<sup>9</sup> The *de minimis* principle is grounded in a decision described by the court case *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980). In this case, reviewing EPA's 1978 PSD regulations, the court recognized that

concentrations, respectively. EPA established such values to be used as screening tools by a major source subject to PSD to determine the subsequent level of PM<sub>2.5</sub> analysis and data gathering required for a PSD permit application. EPA's authority to implement the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *Sierra Club v. EPA*, Case No 10-1413 (D.C. Circuit Court).<sup>10</sup>

## **1. PSD Increments**

PSD increments prevent air quality in clean areas from deteriorating to the level set by the NAAQS. Therefore, an increment is the mechanism used to estimate “significant deterioration”<sup>11</sup> of air quality for a pollutant in an area. Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility “will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.” When a source applies for a permit to emit a regulated pollutant in an area that meets the NAAQS, the state and EPA must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. As described in the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule, pursuant to the authority under section 166(a) of the CAA, EPA promulgated numerical PSD increments

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“there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value.” 636 F.2d at 360. *See* 75 FR 64864.

<sup>10</sup> On April 6, 2012, EPA filed a brief with the D.C. Circuit court defending the Agency's authority to implement SILs and SMC for PSD purposes.

<sup>11</sup> Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the “maximum allowable increase” of an air pollutant allowed to occur above the applicable baseline concentration<sup>11</sup> for that pollutant. Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the air quality at the time of the first application for a PSD permit in the area.

for PM<sub>2.5</sub> as a new pollutant<sup>12</sup> for which NAAQS were established after August 7, 1977,<sup>13</sup> and derived 24-hour and annual PM<sub>2.5</sub> increments for the three area classifications (Class I, II and III) using the “contingent safe harbor” approach. See 75 FR 64869 and ambient air increment tables at 40 CFR 51.166(c)(1) and 52.21(c). In addition to PSD increments for the PM<sub>2.5</sub> NAAQS, the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for “*major source baseline date*” and “*minor source baseline date*” (including trigger date) to establish the PM<sub>2.5</sub> NAAQS specific dates associated with the implementation of PM<sub>2.5</sub> PSD increments. See 75 FR 64864.

## **2. Significant Monitoring Concentrations**

As mentioned above, the SMC numerical value represents a threshold of insignificant (i.e., *de minimis*) monitored ambient impacts on pollutant concentrations. In the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule, EPA established a PM<sub>2.5</sub> SMC of 4 µg/m<sup>3</sup> to be used as a screening tool by a major source subject to PSD to determine the subsequent level of PM<sub>2.5</sub> data gathering required for a PSD permit application. Using the SMC as a screening tool, sources may be able to demonstrate that the modeled air quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC (i.e., *de minimis*), and as such, may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority.

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<sup>12</sup> EPA generally characterized the PM<sub>2.5</sub> NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM<sub>10</sub> NAAQS with the NAAQS for PM<sub>2.5</sub> when the PM<sub>2.5</sub> NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for PM<sub>2.5</sub> as if PM<sub>2.5</sub> was a new pollutant even though EPA had already developed air quality criteria for PM generally. See 75 FR 64864 (October 20, 2012).

<sup>13</sup> EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

Recently, the Sierra Club filed suit challenging EPA's authority to implement the PM<sub>2.5</sub> SILs<sup>14</sup> as well as the SMC for PSD purposes as promulgated in the October 20, 2012, rule. *Sierra Club v. EPA*, Case No 10-1413, D.C. Circuit Court. Specifically, regarding the SMC, Sierra Club claims that the use of SMCs to exempt a source from submitting a year's worth of monitoring data is inconsistent with the CAA. EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which describes the Agency's authority to develop and promulgate SMC.<sup>15</sup> A copy of EPA's April 6, 2010, Brief can be found in the docket for today's final rulemaking at [www.regulations.gov](http://www.regulations.gov) using docket ID: EPA-R04-OAR-2012-0081.

## **II. This Action**

EPA is taking final action to approve into the Mississippi SIP portions of the State's May 12, 2011, SIP revision, which IBR the PSD permitting regulations to implement the PM<sub>2.5</sub> NAAQS. Mississippi's regulation APC-S-5 IBR the federal NSR PSD regulations at 40 CFR 51.166 and 52.21 into the Mississippi SIP. In effect, MDEQ's May 12, 2011, SIP revision updates the State's IBR date for APC-S-5 to March 22, 2011, to include PSD permitting regulations promulgated in the NSR PM<sub>2.5</sub> Rule and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule in the Mississippi SIP. These changes to Mississippi's regulation APC-S-5 became state effective on June 2, 2011. MDEQ's SIP revision IBR the NSR PM<sub>2.5</sub> Rule PSD provisions at

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<sup>14</sup> As mentioned earlier, due to litigation by the Sierra Club, EPA is not taking final action on the SILs portion of the Mississippi May 12, 2011, SIP revision at this time but will take action once the court case regarding SILs implementation is resolved.

<sup>15</sup> Additional information on this issue can also be found in an April 25, 2010, comment letter from EPA Region 6 to the Louisiana Department of Environmental Quality regarding the SILs-SMC litigation. A copy of this letter can be found in the docket for today's rulemaking at [www.regulations.gov](http://www.regulations.gov) using docket ID: EPA-R04-OAR-2012-0081.

regulation APC-S-5, including: (1) the requirement for NSR permits to address directly emitted PM<sub>2.5</sub> and precursor pollutants; (2) significant emission rates for direct PM<sub>2.5</sub> and precursor pollutants (SO<sub>2</sub> and NO<sub>x</sub>) and establishing PM<sub>2.5</sub> precursors (as amended at 40 CFR 51.166(b)(23)(i)) for the definition of “*significant*” and “*regulated NSR pollutant*,” respectively; and (3) PSD requirement for states to address condensable PM in establishing enforceable emission limits for PM<sub>10</sub> and PM<sub>2.5</sub> (as amended at definition of “*regulated NSR pollutant*” at 40 CFR 51.166(b)(49)).

Regarding the condensable provision, in light of Mississippi’s request in its June 26, 2012, letter and EPA’s intention to amend the definition of “regulated NSR pollutant” as discussed in the March 12, 2012, correction rulemaking, EPA is not taking final action to approve the terminology “particulate matter emissions” into the Mississippi SIP (at APC-S-5) for the condensable provision in the definition of “*regulated NSR pollutant*.” See 77 FR 15656. EPA is, however, taking final action to approve into the Mississippi SIP the remaining condensable requirement at 40 CFR 51.166(b)(49)(vi), which requires that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for PM<sub>2.5</sub> and PM<sub>10</sub>. Mississippi’s May 12, 2011, SIP revision did not IBR the grandfathering provision at 40 CFR 52.21(i)(1)(xi) in accordance with the repeal of the PM<sub>2.5</sub> grandfathering provision. Rather, the SIP revision includes new language at APC-S-5(2.7) that excludes the provision for PM<sub>2.5</sub> (at 40 CFR 52.21(i)(1)(xi)) from the PSD program regulations.

As stated in Mississippi’s May 12, 2011, SIP revision, NO<sub>x</sub> will be considered a precursor to PM<sub>2.5</sub> in Mississippi until such time as EPA takes action on the State’s NO<sub>x</sub> insignificance demonstration or upon plan disapproval. As part of MDEQ’s May 12, 2011,

revision to IBR the federal regulations at 40 CFR 51.166 and 52.21, EPA is taking final action, at this time, to approve into the Mississippi SIP that NO<sub>x</sub> is a presumed PM<sub>2.5</sub> precursor. EPA is considering Mississippi's NO<sub>x</sub> insignificance demonstration and will take action on this portion of the May 12, 2011, SIP submission in a separate rulemaking. Mississippi's May 12, 2011, SIP revision also removes from APC-S-5(2.7) language that excludes NSR PM<sub>2.5</sub> Rule permitting requirements from inclusion into the Mississippi SIP.<sup>16</sup> Because MDEQ's May 12, 2011, SIP revision adopts the aforementioned provisions promulgated in the May 16, 2008, NSR PM<sub>2.5</sub> Rule, the exclusion language is no longer necessary.

With respect to the PM<sub>2.5</sub> PSD Increment-SILs SMC Rule, EPA is taking final action to also approve into the Mississippi SIP the PSD increments for PM<sub>2.5</sub> annual and 24-hour NAAQS pursuant to section 166(a) of the CAA and SMC of 4 µg/m<sup>3</sup> for PM<sub>2.5</sub> NAAQS. The May 12, 2011, SIP revision IBR the PM<sub>2.5</sub> increments established in the ambient air increment tables at 40 CFR 51.166(c)(1) and (p)(4) and 52.21(c); the amendments to the "*major source baseline date*" (at 40 CFR 51.166(b)(14)(i)(c)) and 52.21(b)(14)(i)(c)); the "*minor source baseline date*" and establishment of the "trigger date" (40 CFR 51.166(b)(14)(ii)(c) and 52.21(b)(14)(ii)(c)); and the definition of "*baseline area*" (at 40 CFR 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i) and (ii)).

Regarding the SILs and SMC, EPA's authority to implement the PM<sub>2.5</sub> SILs and SMC is currently the subject of litigation by the Sierra Club. In a brief filed in the D.C. Circuit on April 6, 2012, EPA described the Agency's authority under the CAA to promulgate and implement the SMCs and SILs *de minimis* thresholds. *Sierra Club v. EPA*, Case No 10-1413 D.C. Circuit.

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<sup>16</sup> In Mississippi's December 9, 2010, Greenhouse Gas Tailoring Rule final SIP revision, MDEQ added specific language at APC-S-5(2.7) excluding from the IBR of 40 CFR 52.21 the PSD NSR PM<sub>2.5</sub> Rule provisions promulgated in the May 16, 2008, rule and stated they would submit a separate rulemaking to address those PSD requirements.

However, EPA is finalizing approval of the promulgated SMC thresholds into the Mississippi SIP because the Agency believes the SMC is a valid exercise of the Agency's *de minimis* authority as well as the fact they are consistent with EPA's promulgated levels in the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule. The ongoing litigation may result in the court decision that may require subsequent rule revisions and SIP revisions from Mississippi.

In response to the litigation, EPA requested that the court remand and vacate the new regulatory text at 40 CFR 51.166(k)(2) and 52.21(k)(2) concerning the implementation of SILs for PM<sub>2.5</sub> so that EPA can make necessary rulemaking revisions to that text.<sup>17</sup> In light of EPA's request for remand and vacatur and our acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, the Agency has determined at this time not to approve the SILs portion of the MDEQ's May 12, 2011, SIP revision that contains the affected regulatory text in Mississippi's PSD regulations at APC-S-5. EPA will take action on the SILs portion of Mississippi's May 12, 2011, SIP revision in a separate rulemaking once the issue regarding the court case has been resolved.<sup>18</sup>

### **III. Final Action**

EPA is taking final action to approve portions of Mississippi's May 12, 2011, SIP revisions (with the exception of the term "particulate matter emissions" and the SILs threshold

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<sup>17</sup> In the preamble to the October 20, 2010, final rule EPA indicates that the Agency does not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of regulating authority for use in the PSD permitting process. *See* 75 FR 64864 at 64899.

<sup>18</sup> EPA is currently developing guidance to provide provisional course of action to implement the PM<sub>2.5</sub> SILs pending revision to the (k)(2) provisions and the litigation. The guidance will ensure that the PM<sub>2.5</sub> SILs are properly applied as part of a PSD compliance demonstration to show that a source's impact will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS or increment.

and provisions) that IBR federal regulations amended in the NSR PM<sub>2.5</sub> and the PM<sub>2.5</sub> PSD Increment-SILs-SMC Rules to implement the PM<sub>2.5</sub> NAAQS for the NSR program because they are consistent with section 110 of the CAA and its regulations regarding NSR permitting.

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);



- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after

it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register].

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements.

*See* section 307(b)(2).

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference,  
Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements and  
Volatile organic compounds.

Dated: September 6, 2012

A. Stanley Meiburg  
Acting Regional Administrator,  
Region 4.

40 CFR part 52 is amended as follows:

**PART 52-[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

Authority: 42.U.S.C. 7401 *et seq.*

**Subpart Z – Mississippi**

2. Section 52.1270(c) is amended by revising entry “APC-S-5” to read as follows:

**§52.1270 Identification of plan.**

\* \* \* \* \*

(c)\* \* \*

**EPA-Approved Mississippi Regulations**

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
<b>APC–S–5–Regulations for Prevention of Significant Deterioration for Air Quality</b>				
All		06/2/2011	[Insert date of publication in <u>Federal Register</u> ] [Insert citation of publication]	As of [Insert date of publication in <u>Federal Register</u> ] EPA is approving a revision to APC–S–5 incorporating by reference the regulations found at 40 CFR 52.21 as of March 22, 2011. <i>See</i> [Insert citation of publication]. This approval does not include Mississippi’s revision to IBR (at

				<p>Rule APC-S-5) the term “particulate matter emissions” (as promulgated in the May 16, 2008 NSR PM<sub>2.5</sub> Rule (at 40 CFR 51.166(b)(49)(vi)) and the PM<sub>2.5</sub> SILs threshold and provisions (as promulgated in the October 20, 2010 PM<sub>2.5</sub> PSD Increment-SILs-SMC Rule at 40 CFR 52.21(k)(2)).</p> <p>On December 29, 2010, EPA approved a revision to APC–S–5 which incorporated by reference the regulations found at 40 CFR 52.21 as of September 13, 2010. <i>See</i> 75 FR 81858. That action approved the incorporation by reference with the exception of the phrase “except ethanol production facilities producing ethanol by natural fermentation under the North American Industry Classification</p>
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				<p>System (NAICS) codes 325193 or 312140,” APC–S–5 incorporated by reference from 40 CFR 52.21(b)(1)(i)(a) and (b)(1)(iii)(t). Additionally, that final EPA action did not incorporate by reference, into the Mississippi SIP, the administrative regulations that were amended in the Fugitive Emissions Rule (73 FR 77882) and are stayed through October 3, 2011.</p>
*	*	*	*	*

[FR Doc. 2012-23570 Filed 09/25/2012 at 8:45 am; Publication Date: 09/26/2012]